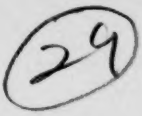

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 315

J. S. ODLAND, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,

Petitioner,

v.

FAIRMONT SUPPLY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

ELI WHITNEY DEBEVOISE,
Counsel for Respondent.

DEBEVOISE, STEVENSON, PLIMPTON & PAGE,
FRANCIS T. P. PLIMPTON,
TUSCA MORRIS,
ROBERT C. MORRIS,
Of Counsel.

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I

Opinions of Courts Below

The judgment of the Circuit Court of Marion County, West Virginia (R. 186-191), entered on February 13, 1942, which dismissed the petitioner's bill of complaint, and which is here sought to be reviewed, was rendered without opinion and is not reported. The order of the Supreme Court of Appeals of the State of West Virginia (R. 1-2), entered on May 18, 1942, refusing, without opinion, appeal from the above-mentioned judgment of February 13, 1942, is also not reported.

The opinion of the Supreme Court of Appeals of the State of West Virginia of March 15, 1941 (R. 194-198), on the basis of which the above mentioned judgment of the Circuit Court of Marion County of February 13, 1942 was entered, is reported in 14 S. E. (2d) 436.

Earlier Proceedings

This is a suit in the Circuit Court of Marion County, West Virginia, for the specific performance of a contract to purchase certain West Virginia real estate, and involves the construction, under West Virginia law, of deeds to that real estate running to the plaintiff's predecessor.

The respondent demurred, on the ground that the bill of complaint showed that under West Virginia law the plaintiff did not have title to the real estate. The Circuit Court of Marion County, West Virginia, by an unreported decree dated November 12, 1940 (R. 148-152) overruled the demurrer, without opinion. The Supreme Court of Appeals of West Virginia handed down the above-mentioned opinion of March 15, 1941 (R. 194-198), 14 S. E. (2d) 436, reversing the ruling of the Circuit Court of Marion County. The unreported order of the Supreme Court of Appeals of West Virginia of March 15, 1941 reversing the lower court's decree of November 12, 1940 is at R. 153. On May 15, 1941 the Supreme Court of Appeals of West Virginia denied, without opinion, a rehearing (R. 154).

On November 10, 1941, the Supreme Court of the United States denied a petition for writ of certiorari "for the want of a final judgment", No. 669, October Term, 1941, 314 U. S. 679.

There followed, on February 13, 1942, the Circuit Court judgment, referred to above, which is here sought to be reviewed.

II

Jurisdiction

The petitioner contends that jurisdiction to review the judgment of the Circuit Court of Marion County is granted by Section 237 (b) of the Judicial Code (U. S. C. A. Title 28, c. 9, Section 344 (b)) providing for the granting of a writ of certiorari by this Court to review a "final judgment or decree" of "the highest court of State in which a decision could be had" where any title, right or privilege is claimed by either party under a statute of the United States.

As appears more fully below, the respondent submits that this suit involves only questions of West Virginia law as to title to West Virginia real estate, that no federal statutory question was involved in the actual decision of the State court, and that, to the extent that federal statutory questions could be considered to have been discussed, the court's comments thereon were not necessary to the actual decision of the case, which was based on a decisive non-federal ground clearly severable from any claimed federal ground.

III

Summary Statement of the Case

This suit is a suit in the West Virginia courts for the specific performance of a contract for the purchase of West Virginia real estate, and is in the nature of a suit to quiet title.

The petitioner, J. S. Odland, is the present receiver of The National Bank of Fairmont, West Virginia (referred

to below as the Bank). The petitioner succeeded Howard Hardesty as receiver of the Bank, who, in turn, had succeeded Robert C. Miller as receiver of the Bank.

The instant suit was filed by Howard Hardesty, as receiver of the Bank, in the Circuit Court of Marion County, West Virginia (R. 11-24) against the respondent to compel the respondent to perform its contract to purchase from such receiver certain real estate in Fairmont, West Virginia.

The bill of complaint alleged in substance as follows:

Robert C. Miller, as receiver of the Bank, had obtained a judgment against a debtor of the Bank, and thereafter had caused a judicial sale of certain real estate in Fairmont, West Virginia, belonging to such debtor to be made (R. 14-19). At such sale Miller, as such receiver, had purchased the real estate (R. 18) and the proceeds had been credited on the judgment (R. 19). The deeds to the real estate (R. 19, 80-91) ran to

> "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association."

Thereafter Miller died, and Howard Hardesty was appointed receiver of the Bank in his place (R. 13). Hardesty later entered into contracts (R. 20, 91-126) to sell such real estate to the respondent for $8,100; under those contracts the respondent paid down $2,025, and agreed to pay the balance upon delivery of the deed; 30 days was allowed the respondent to examine title (R. 20, 91). The respondent later refused to complete the sale, on the ground that Hardesty did not have proper title to the real estate (R. 21-22).

The bill of complaint was then filed by Hardesty, as receiver, to compel specific performance of the contract.

The respondent filed a demurrer (R. 144-148) to the bill of complaint. The Supreme Court of Appeals of West Virginia thus summarizes the contentions of the respondent's demurrer (R. 195-196):

> "In support of the demurrer, defendant contends that the bill of complaint shows on its face that plaintiff does not have legal title to the four parcels hereinbefore mentioned and that the conveyance thereof operated to vest title to the real estate in Robert C. Miller, individually, and that the words 'Receiver of The National Bank of Fairmont, an insolvent national banking association' are *descriptio personae* of the grantee; that the title to the real estate did not pass to Miller's successor by operation of law or any other instrument; that the deeds are plain and unambiguous; that the construction thereof cannot be resorted to to explain any trust estate, and that the heirs-at-law of Robert C. Miller are now the owners of the legal title to the real estate conveyed thereby. ***"#

The Circuit Court of Marion County, West Virginia, overruled the respondent's demurrer, without opinion (R. 149).

The petitioner's brief, at pp. 5 and 6, by rearranging the order of the respondent's contentions and changing their emphasis, gives an entirely erroneous impression of these contentions.

(1) Decision of Supreme Court of Appeals of West Virginia of March 15, 1941

On certification of points of law to the Supreme Court of Appeals of West Virginia (R. 149-153), the Supreme Court of Appeals on March 15, 1941, handed down an opinion (R. 194, 14 S. E. (2d) 438) reversing the ruling of the Circuit Court of Marion County "without prejudice to the rights of any person who may assert ownership of the four parcels of land mentioned in this cause" (R. 198, and see the order at R. 153), and on May 19, 1941, denied a petition for rehearing (R. 154).

It is from this opinion that the petitioner is really appealing, since it is on the basis of this opinion that the Circuit Court of Marion County later entered the order dismissing the petitioner's bill of complaint which the petitioner now seeks to have this Court review.

The Supreme Court of Appeals of West Virginia states in its syllabus (prepared by the Court) exactly what its holdings were (R. 194, 14 S. E. (2d) at p. 436):

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is situated.
>
> 2. Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual.
>
> 3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law."

Under West Virginia law, the syllabus, prepared by the Court itself, constitutes the law decided in the case. See *Bank v. Burdette*, 61 W. Va. 637, 57 S. E. 53, where the Court said at 57 S. E. p. 54:

> "Now, our Constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion,"

and *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, at p. 356, where this Court said:

> "There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus —(p. 480) which in West Virginia is the law of the case, whatever *may* be the reasoning employed in the opinion of the Court—is as follows . . . ".

It is therefore clear, beyond question, that the Supreme Court of Appeals of West Virginia decided three things, and three things only.

The first was the decision that the law of West Virginia determined what title Miller took by the conveyance of West Virginia real estate to "R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association" (R. 197).

Secondly, having decided that West Virginia law governed, the Court held that, under West Virginia law, the deeds to Miller having been made "to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* and title vests in the grantee indvidually" (R. 197).

Thirdly, title having vested by the deeds in Miller *as an individual*, the Court could find no statute which passed the title from Miller *as an individual* to the successor receiver of the Bank (paragraph 3 of the syllabus, quoted *supra*; R. 194).*

The petitioner's brief (pp. 7-8) gives an entirely erroneous impression of the decision of the Supreme Court of Appeals. The decision will be analyzed in greater detail below, and it is sufficient at this point to emphasize, again, that under West Virginia law the syllabus constitutes the law of the case, and that such syllabus does not even mention the collateral comments which the petitioner is now contending are the holdings of the Court.

However, the petitioner is not helped by this argument, for it is clear that, the Court having held that, under West Virginia law, the deeds vested title in Miller *as an individual*, any statement as to what would have happened if the deeds had vested title in him *in his fiduciary capacity*, is the merest dictum.

This is conclusively proved by the fact that, even if the Court had felt that there was a statute transferring Miller's fiduciary title, at his death, to the successor receiver by operation of law, the Court would still have reached the result that it did—since it had already held that, under West Virginia law, Miller got no title whatsoever in his fiduciary capacity.

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* If the wording of paragraph 3 of the syllabus, referring to the passage of title from Miller *as an individual* is ignored (and of course it cannot be), it might be argued—as the petitioner's brief does (pp. 7-8)—that the Court decided that, even if the deeds *had* vested title in Miller in his fiduciary capacity (and not in his individual capacity), the Court could find no statutory authority for the transfer of such title at Miller's death, by operation of law, to the successor receiver.

(2) Proceedings After Decision of Supreme Court of Appeals of March 15, 1941

After the case was remanded to the Circuit Court of Marion County as a result of the decision of the Supreme Court of Appeals of March 15, 1941, the plaintiff filed an amended and supplemental bill of complaint (R. 154-173) on April 15, 1941, joining the heirs-at-law of Robert C. Miller as parties, and praying that a trust of the real estate be decreed and that it be held that neither Robert C. Miller nor his heirs had any interest in the real estate individually. The respondent and the heirs answered the amended bill and admitted its allegations (R. 175, 177).

Later, the plaintiff reversed his course, and moved to dismiss his own amended bill (R. 180). The respondent, which was anxious to have the title to the real estate properly and finally passed upon, with all the proper parties before the Court, resisted the motion (R. 183-186), which, however, the Circuit Court granted on October 6, 1941 (R. 182). Later, the Circuit Court by order entered February 13, 1942 (R. 186-191) dismissed the original bill of complaint. It is that order which this Court is asked to review. The petitioner then appealed to the Supreme Court of Appeals of West Virginia from such order, and an appeal was refused by that Court (R. 1).

IV

Question Presented

There is only one question presented by this petition:

Did the Supreme Court of Appeals of West Virginia properly hold that West Virginia law governs the construction and effect of deeds of West Virginia real estate

running to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association"?

If that holding is correct, the petition must be denied.

This follows from the fact that the West Virginia Court's decision as to the West Virginia law applicable to those deeds involves a non-federal question not reviewable by this Court, and from the further fact that such decision was decisive of the case—regardless of any discussion of any collateral so-called federal questions.

As will be pointed out in detail below, petitioner's brief (pp. 12-13) incorrectly states the questions presented in this case.

There is no issue (petitioner's brief, p. 12, par. (1), to the contrary notwithstanding) as to whether the receiver of a national bank, when authorized to purchase real estate on behalf of the receivership, has capacity and power to take title to the property in his name *in his fiduciary and representative capacity.* That question is not presented in this case at all, for in point of fact Miller took deeds of West Virginia real estate which the West Virginia court has held, under the governing West Virginia law, conveyed the title to him *individually*, and *not* to him in his fiduciary and representative capacity. There can be no issue as to Miller's capacity or power to do something which in fact he did not do.

Also, there is no question in this case (petitioner's brief, p. 12, par. (2), to the contrary notwithstanding) as to whether, upon the death or resignation of a receiver of a national bank, the assets held by such receiver in his fiduciary capacity pass, by operation of the national banking laws, to the successor receiver. Here, under West Vir-

ginia law, the deeds of West Virginia real estate to the predecessor receiver vested the real estate in him in his *individual capacity*, and not in his fiduciary capacity; there can therefore be no question as to the applicability of the national banking laws, since the predecessor receiver never obtained the real estate in his fiduciary capacity as a national bank receiver at all, but only *as an individual*.

V

Argument

A. The West Virginia Court correctly held that West Virginia law governs the construction of deeds of West Virginia real estate running to the receiver of a national bank located in West Virginia.

It is well settled that the transfer of real estate is governed by the law of the state in which the real estate is situated.

The opinion of the Supreme Court of Appeals of West Virginia (R. 196-197, 14 S. E. (2d), at p. 438), sums up convincingly the law on the point:

> "*** Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located. *Olmstead v. Olmstead*, 216 U. S. 386, 54 L. Ed. 550, 30 Sup. Ct. 292; *In re Barnett* (2 C. C. A.) 12 Fed. (2d) 73; *Irving Trust Co. v. Maryland Casualty Co.*, 83 Fed. (2d) 168. 'The nature of the interest created by the conveyance is determined by the law of the state where the land is situated.' Restatement of the Law, Conflict of Laws, Section 221. Gen-

> erally, as to the legal effect and interpretation of words used in an instrument conveying land, see Conflict of Laws, supra, Sections 214, *et seq.* It is no longer open to question that the legal effect and interpretation of words used in an instrument conveying land situate in this state are to be measured by the laws of this jurisdiction. *Klink v. Price*, 4 W. Va. 4, 6 A. L. R. 37, 268. This principle is recognized and discusssed in the case of *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. This being true, we look to the laws of this state to determine what title Miller took by the conveyance to him as 'receiver of the National Bank of Fairmont, an insolvent National Banking Association'."

The fact that a national bank, or the receiver of a national bank, is involved in the deeds to the West Virginia real estate, has no effect whatsoever on the conclusion that West Virginia law governs. The acquisition and transfer of real estate by national banks is governed by the law of the state in which the real estate is situated. See *Nagle v. Herold*, 30 F. Supp. 905 (W. D. N. Y., 1939), where the Court said, at p. 905:

> "The Seneca National Bank of West Seneca is a national bank. Insofar as its contracts are concerned it is subject to the laws of the State of New York, in which it is located. 'National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than the nation. All their contracts are governed and construed by state laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on state law. **** " (*First*) *National Bank v. Commonwealth* (*of Kentucky*), 9 Wall. (353), 362, (19. L. Ed. 701.' *McClellan v. Chipman*, 164 U. S. 347, 356, 17 S. Ct. 85, 87, 41 L. Ed. 46; *First National Bank v. State of Missouri*, 263 U. S. 640, 656, 44 S. Ct. 213, 68 L. Ed. 486. See, also, *Lewis, Rec'r. v. Fi-*

delity & Deposit Co. of Maryland, 292 U. S. 559, 54 S. Ct. 848, 78 L. Ed. 1425, 92 A. L. R., 794." (Italics ours)

In the leading case of *National Bank v. Commnwealth*, 9 Wall. 353 (1869), this Court said, at p. 362:

> "They (national banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by the State laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." (Italics ours)

It is clear, then, that the Supreme Court of Appeals of West Virginia was correct in its holding that the deeds to "Robert C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association," being deeds of real estate located in West Virginia, were to be construed in accordance with the law of West Virginia.

B. No federal ground was involved in the decision that, under West Virginia law, the deeds transferred title to Robert C. Miller as an individual and not in his fiduciary capacity.

It was purely on grounds of West Virginia law that the West Virginia Supreme Court of Appeals decided that, under West Virginia law, the deeds of West Virginia real estate to R. C. Miller had the effect of transferring title to him *as an individual*, and not in his fiduciary capacity.

The first step of the Court was to hold that, under West Virginia law, the deeds were not ambiguous, and that such deeds, alone, determined the status of the title to the land in question (R. 197).

The Court then went on to hold (R. 197):

> "In this state it has been said that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually. *Hyman v. Swint*, 94 W. Va. 627, 119 S. E. 866; *Donahoe v. Rafferty*, 82 W. Va. 535, 96 S. E. 935. See also, *Pfeiffer v. Rheinfrank*, 37 N. Y. S. 1076. We see no reason to change the rule announced in the cases of *Hyman v. Swint* and *Donahoe v. Rafferty*, supra."

The Court accordingly held that, as a matter of West Virginia law,

> "Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual."

This is the language of paragraph 2 of the Court's syllabus (R. 194), which, as already shown, constitutes under West Virginia law the actual decision of the case.

It was thus not any doubts or questions as to the National Banking Act that led the Court to hold that, as a matter of West Virginia law (which it had just held was the governing law), title passed to Robert C. Miller individually and not in his fiduciary capacity. It was the West Virginia doctrine that a title or office is merely *descriptio personae* (as exemplified in *Hyman v. Swint* and *Donahoe v. Rafferty*, cited in the portion of the Court's opinion just quoted) which led the Court to reach the decision that it did.

It is therefore clear beyond the possibility of question that the holding of the Court that the deeds transferred

the title to Robert C. Miller *as an individual*, and not in his fiduciary capacity, was a holding based solely on *West Virginia* law, and that no federal ground whatsoever was involved in the holding.

C. The decision that, under West Virginia law, the deeds transferred title to Robert C. Miller as an individual and not in his fiduciary capacity, completedly disposed of the case, and the so-called federal questions mentioned by the petitioner were not involved in the decision at all.

The Court's holding that, under West Virginia law, the deeds transferred the title to the West Virginia real estate to Robert C. Miller as an individual and not in his fiduciary capacity, completely disposed of the case. With title in Miller individually at the time of his death, and with no transfer from him or his heirs to Hardesty, his successor as receiver, the Court was of course required to uphold the respondent's demurrer, since it was clear that Hardesty had never obtained title from Miller as an individual or from Miller's heirs-at-law, and was therefore not in a position to tender good title to the respondent.

The so-called federal question as to whether, under the national banking laws, Miller had the right to take title to West Virginia real estate *in his fiduciary capacity* (petitioner's brief, pp. 12, 19), was thus not involved in the decision at all.

Miller did *not* take title in his fiduciary capacity, and the question of whether he had authority to do so therefore was not in issue. Instead, Miller took deeds which, under the applicable West Virginia law, transferred title to him *not* in his fiduciary capacity, but in his *individual capacity*.

When the Court discusses Miller's having "no authority to take title to the property in his own name" (R. 198), it is clear that the Court means that he had no authority to take title in his own name *as an individual*, since that was the legal effect, under the West Virginia *descriptio personae* cases, of the deeds which he did take.

That the national banking laws powers of Miller had nothing to do with the Court's decision is further shown by the syllabus (the *actual* decision, under West Virginia law, *supra*, p. 6), which never mentions the national banking laws, but straightforwardly states (R. 194) that the law of the state where the land is situated governs the conveyance, and that the deeds in question transferred legal title to the receiver *as an individual*.

Nor was there involved in the decision any so-called federal question as to the passage of title to receivership assets by operation of law under the national banking laws from one receiver of a national bank to his successor receiver (petitioner's brief, pp. 12, 19-20, to the contrary notwithstanding).

Paragraph 3 of the syllabus of the Court's decision is decisive in this regard. It will be remembered that it reads (R. 194):

> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver *as an individual*, does not pass to his successor by operation of law." (Italics ours)

Here it is clear that the Court, which in the preceding paragraph 2 of the syllabus had held that legal title to the land was in Miller *as an individual* (and *not* in his fiduciary capacity), was here holding that there was nothing in the national banking laws which purported to pass title from Miller *as an individual* to his successor, Hardesty.

Indeed, the petitioner does not purport to claim that there is any such federal statute, or that there is any federal ground for claiming that title passed, by operation of law, from Miller *in his individual capacity* to his successor receiver.

Instead, the petitioner takes the position that the Court held that, upon the death or resignation of a national bank receiver, there is no federal statute providing that title to property held by that receiver *in his fiduciary capacity* passes by operation of law to the successor receiver (petitioner's brief, pp. 12, 20).

As we have shown, the Court's language is not in fact directed to the transfer by operation of law of title to property held by a receiver *in his fiduciary capacity*, since no such situation was before the Court, Miller having acquired the property by deeds which vested the title in him *in his individual capacity* and *not* in his fiduciary capacity.

However, even if the Court's language as to there not being any statutory provision for the passage of title from a deceased receiver to his successor by operation of law, could be considered to be directed to the passage of title held by a receiver in his fiduciary capacity, the petitioner's contentions as to the point would not be helped. Thus, any statement by the Court that, as a matter of federal law, there is no transfer by operation of law of property held by one national bank receiver in his fiduciary capacity to a successor receiver, would be the merest dictum. This is so for the simple reason that the Court had just held that, under the applicable West Virginia law, Miller, the predecessor receiver, did *not* hold the title in his fiduciary capacity but, instead, held it in his *individual capacity*.

Nothing could be more of a dictum than such a statement—a statement based on the hypothesis that what the Court has just held to be so is not so.

Note, also, that, even if the petitioner's contention that the national banking law in some undisclosed fashion does transfer the fiduciary title of a national bank receiver at his death by operation of law to the successor receiver, could be considered correct, the Court would still have reached exactly the result that it did reach. This follows from the fact that the Court had already held that, under West Virginia law, Miller had received no title at all in his fiduciary capacity, but had received title only in his individual capacity. That being so, the supposed transfer by operation of law would never come into effect at all, and the Court would still be required to hold that Hardesty did not have the title when the respondent refused to accept deeds from him.

Accordingly, since the so-called federal questions mentioned by the petitioner are not really involved in the Court's actual decision at all, we submit that the decision on the applicable West Virginia law, completely disposing of the case, is not subject to review by this Court.

D. This Court will not grant certiorari where, as here, the non-federal ground is decisive, and severable from any claimed federal grounds.

We believe that we have shown, under Point C above, that in fact no federal questions were involved in the actual decision of the Supreme Court of Appeals of West Virginia. However, the existence of any such federal grounds, even if they could be considered to have been involved in the decision, is not enough to support a writ of certiorari.

It is settled law that, where the judgment of a state court is predicated upon non-federal and federal grounds, and the non-federal grounds are severable from, and independent of, the federal grounds, and are broad enough to sustain the judgment, this Court will not grant a writ of certiorari to review such judgment. *Johnson v. Risk*, 137 U. S. 300; *Adams v. Russell*, 229 U. S. 353, 359; *Doyle v. Atwell*, 261 U. S. 590, 592; *McCoy v. Shaw*, 277 U. S. 303; *Ancient Egyptian Order v. Michaux*, 279 U. S. 744, 745; *United States v. Hastings*, 296 U. S. 188; *Fox Film Corp. v. Muller*, 296 U. S. 209, 210 and *Honeyman v. Hanan*, 300 U. S. 14.

Under this doctrine, it is clear that the writ of certiorari should be denied, for the non-federal ground of the West Virginia Court's decision that, under the West Virginia legal doctrine of *descriptio personae*, Miller did not receive legal title to the West Virginia real estate in his fiiduciary capacity, but, instead, received it in his individual capacity, is severable from and independent of any claimed federal ground, and is broad enough, by itself and standing alone, to sustain the judgment that Hardesty did not have good title to the real estate when he asked the respondent to complete the sale.

VI

There Are No Reasons for Granting the Writ

The reasons relied upon by the petitioner for the requested allowance are set forth in the petitioner's brief at pp. 23-25, and may be summarily dealt with.

The petitioner first repeats the entirely erroneous claim that the Supreme Court of Appeals of West Virginia decided that

> "A receiver of a national bank cannot take title in his own name, in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership" (petitioner's brief, p. 23).

As we have already shown, the Court's decision involved no such holding at all. It merely held that, under West Virginia law, a deed made out to "R. C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," passed legal title to Miller *as an individual*, and not as a fiduciary.

The petitioner next repeats the equally erroneous contention that the Supreme Court of Appeals of West Virginia decided that under the national banking laws title to assets held by a national bank receiver *in his fiduciary capacity* does not pass, by operation of law, to a successor receiver (petitioner's brief, p. 24). As we have also already shown, the Court made no such holding, since its remarks as to the national banking laws were directed at the transfer of assets held by a receiver *as an individual* and since, in any event, such remarks, even if considered to apply to assets held by a receiver in his fiduciary capacity, would be the merest dictum, inasmuch as the Court had before it assets which, under West Virginia law, were the property of the receiver in his *individual capacity.*

The petitioner then refers (petitioner's brief, p. 24) to a supposed long-established construction and interpretation by the Comptroller of the Currency that title may properly be taken by national bank receivers of real estate acquired by them. We pass the fact that no such construction or interpretation is shown in the record in this case, and again point out that there is absolutely nothing in the decision of the West Virginia court which prevents national bank receivers from acquiring West Virginia real estate in their fiduciary capacity *if they will only take the modi-*

cum of pains required to have the deeds to them conform to the simple requirements of West Virginia law for establishing fiduciary capacity. All that Miller needed to do in the instant case was to make sure that the deeds to him clearly and unambiguously indicated that he was acquiring the real estate in a fiduciary capacity. For example, he could have made the deeds read "to Robert C. Miller *as* receiver," which would have clearly established his fiduciary capacity.* See *Hughes v. Charlton*, 104 *W. Va.* 640, 141 S. E. 1. *Fleck v. Ellis*, 87 S. E. 1055; 144 Ga. 732. *State v. Gray*, 111 So. 242. This he did not take the trouble to do; instead he took deeds which fell squarely within the long-established West Virginia *descriptio personae* doctrine and gave no indication, under that doctrine, of his fiduciary capacity.

The petitioner's brief (p. 24) refers to the validity and effectiveness of titles to real estate dealt in by national bank receivers. It is submitted that such validity and effectiveness would be best served by a closer attention to West Virginia real estate law on the part of such receivers, and that the stability of West Virginia real estate titles would be greatly disturbed by the purported review, here sought by the petitioner, of the long-established West Virginia real estate law as to *descriptio personae* deeds. See *Hyman v. Swint* and *Donahoe v. Rafferty*, supra.

It is also submitted that the "future guidance" which the petitioner's brief (p. 25) implies is needed by the Comptroller of the Currency in the administration of the national laws will be amply provided by the denial of this writ of certiorari and the consequent conclusion that deeds to West Virginia real estate should be prepared in the light of West Virginia law.

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* Note that this suit was brought by "Howard Hardesty *as* receiver * * * " (R. 1. 3, 11, 13 *et passim*).

It should also be pointed out that all that the petitioner needs to do to straighten out the difficulties resulting from his predecessor's failure to observe West Virginia real estate law is to bring a suit to impress a trust on the real estate and to join the heirs of Miller in the suit. This is the sensible course which the petitioner first took after the decision of the Supreme Court of Appeals, when he filed his amended and supplemental bill of complaint (R. 154-173) on April 15, 1941. In that course the respondent and the heirs of Miller fully cooperated by admitting the allegations of the new bill (R. 175-178, see supra p. 9). However, as stated above, (p. 9), the petitioner later reversed his course, obtained a dismissal of his amended and supplemental bill of complaint against the respondent's objections, and chose to stand on his original bill of complaint—hence this petition.

The respondent will cheerfully complete the purchase of the West Virginia real estate involved in this suit as soon as the plaintiff can properly clear up the title to that real estate. But that title should be cleared up within the framework of West Virginia law by a suit (such as the amended bill which the plaintiff filed and then withdrew) to establish that Miller took the real estate as a fiduciary. Title cannot be cleared by the instant attempt to get this Court, simply because a national bank receiver is a party, to reverse a long-established and well-settled doctrine of West Virginia real estate law which this Court has no jurisdiction to review.

VII

Conclusion

The State Court's decision is based on adequate non-federal grounds, and the petition for writ of certiorari should be denied.

Respectfully submitted,

ELI WHITNEY DEBEVOISE,
Counsel for Respondent.

DEBEVOISE, STEVENSON, PLIMPTON & PAGE,
FRANCIS T. P. PLIMPTON,
TUSCA MORRIS,
ROBERT C. MORRIS,
Of Counsel.